

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM WEIR,

Plaintiff,

vs.

FORMAN AUTOMOTIVE GROUP,

Defendant.

Case No. 2:12-cv-00746-MMD-VCF

ORDER DISCHARGING IN PART
ORDER TO SHOW CAUSE AND
IMPOSING SANCTIONS ON
MARSHA L. STEPHENSON

On January 18, 2013, this Court scheduled an Early Neutral Evaluation (“ENE”) session and ordered that the parties comply with certain requirements with respect to that ENE session. Docket No. 10 (“ENE Order”). On February 15, 2013, the Court held the ENE session as scheduled. Docket No. 12. On February 19, 2013, the Court ordered Defendant Forman Automotive Group and its counsel Marsha L. Stephenson to show cause why they should not be sanctioned pursuant to Federal Rule of Civil Procedure 16(f), the Court’s inherent authority, and/or Local Rule IA 4-1 on the basis of, *inter alia*, their failure to comply with the Court’s ENE Order. Docket No. 13. The Court has now received a response from Defendant and Ms. Stephenson, Docket No. 14, which the Court has reviewed.

For the reasons discussed below, the Court hereby **DISCHARGES** the order to show cause as to Defendant Forman Automotive Group and **SANCTIONS** Ms. Stephenson personally, pursuant to Fed. R. Civ. P. Rule 16(f), in the amount of Plaintiff’s reasonable costs and attorney’s fees incurred in preparing for and attending the ENE session. Within seven days hereof, Plaintiff shall submit a declaration outlining such fees and costs.

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1 **I. STANDARDS**

2 Parties are required to follow this Court's orders. *See, e.g.*, Fed. R. Civ. P., Rule 16(f).¹
3 Rule 16(f) requires parties to comply with pretrial orders and provides that a judge may order
4 appropriate sanctions, as outlined in Rule 37(b)(2)(A)(ii)-(vii), for non-compliance. The sanctions
5 can be severe in nature, including the terminating sanction of entry of default judgment against a
6 defendant. *See* Rule 37(b)(2)(A)(vi). The Court has discretion to forego imposing the sanctions
7 outlined in Rule 37(b)(2)(A) and instead impose only the reasonable expenses (including attorney's
8 fees) incurred due to the noncompliance with the Court's order. *See* Rule 16(f)(2). Such sanctions
9 are inappropriate where the noncompliance was substantially justified or other circumstances make
10 an award of expenses unjust. *See id.* Whether the party and/or its counsel disobeyed the court order
11 intentionally is impertinent; sanctions may be imposed when the parties and their counsel disobey a
12 court order. *See Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 769 (9th Cir.
13 2001) (sanctions may be imposed when disobedience of a settlement conference order is intentional
14 or unintentional).

15 Court orders regarding court-mandated settlement conferences constitute pretrial orders for
16 which failure to comply may result in imposition of sanctions under Rule 16(f). *See, e.g., Pitman v.*
17 *Brinker Int'l, Inc.*, 216 F.R.D. 481, 483 (D.Ariz. 2003), *amended on review on other grounds*, 2003
18 WL 23353478 (D. Ariz. 2003). Indeed, the Ninth Circuit has upheld repeatedly sanctions imposed
19 for failing to comply with orders regarding settlement conferences. *See, e.g., Lucas Auto.*, 275 F.3d
20 at 769 (affirming sanctions for failure to attend mediation with appropriate representative); *Official*
21 *Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1396 (9th Cir. 1993) (affirming sanctions for failure to
22 comply with order to have representative with settlement authority available by telephone during
23 settlement conference); *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990) (affirming
24 sanctions for attorney who failed to appear at scheduled settlement conference).

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28 ¹ References to "Rules" hereafter refer to the Federal Rules of Civil Procedure.

1 **II. FACTUAL OVERVIEW**

2 ENE sessions provide an important vehicle for the parties to attempt to resolve their disputes.
3 This Court expends significant time preparing for and conducting them, and takes them very
4 seriously. As with settlement conferences, ENE sessions are not meaningful absent attendance by
5 those with settlement authority. To that end, the Court's ENE Order provides in relevant part that:

6 In the case of non-individual parties, counsel shall arrange for a representative
7 with binding authority to settle this matter up to the full amount of the claim to be
8 present for the duration of the ENE session.

9 If any party is subject to coverage by an insurance carrier, then a
10 representative of the insurance carrier with authority to settle this matter up to the full
11 amount of the claim must also be present for the duration of the ENE session.

12 **A request for an exception to the above attendance requirements must be
13 filed and served on all parties at least fourteen (14) days prior to the ENE
14 session. Counsel of record, individual parties, and a fully-authorized
15 representative shall appear in person unless the court enters an order granting a
16 request for exception.**

17 Docket No. 10 at 1 (emphasis in original). The Local Rules echo these requirements, requiring that
18 "the parties with authority to settle the case and their counsel shall attend the early neutral session in
19 person." Local Rule 16-6(e).

20 Defendant and Ms. Stephenson failed to comply with the requirements outlined above. In
21 particular, they appeared at the ENE session without a representative from Defendant's insurance
22 carrier.²

23 Defendant and Ms. Stephenson engaged in only a few minutes of discussion. Ms.
24 Stephenson then indicated that she did not want move forward with the ENE session because she
25 simply did not believe the ENE session would be successful.

26 **III. ANALYSIS**

27 When it became clear during the ENE session that Defendant is subject to coverage by an
28 insurance carrier, the Court inquired why no representative from the insurance carrier was present.
Ms. Stephenson stated that she did not believe such a representative needed to appear, but did not

² The Court notes further that Defendant's written evaluation statement failed to identify an insurer representative as required by the Court's ENE order. *See* Docket No. 10 at 2.

1 want to “quibble” with the Court over the language provided in the ENE Order. Ms. Stephenson did
2 not actually articulate how the language in the ENE Order was ambiguous on this point, and the
3 Court fails to see any room for quibbling here. The ENE Order provides that, “[i]f any party is
4 subject to coverage by an insurance carrier, then a representative of the insurance carrier with
5 authority to settle this matter up to the full amount of the claim must also be present for the duration
6 of the ENE session.” As was made clear at the ENE session, Defendant Forman Automotive Group
7 is subject to coverage by an insurance carrier. There are no exceptions to this order except by Court
8 approval, which was neither sought nor given. Accordingly, a representative from the insurance
9 carrier was required to attend the ENE session.

10 In responding to the order to show cause, Ms. Stephenson fails to provide further elucidation
11 on her contention that the ENE Order does not require attendance by a representative from the
12 insurance carrier. Her response provides that:

13 Defendant had only received a pre-litigation demand from Plaintiff . . . Discovery
14 was in progress by both sides, with some early discussions on the claims being made.
15 However, Plaintiff had made no specific demand. Counsel mistakenly thought that
16 the provision to have a representative with authority to settle up to the full amount of
17 the claim be present would not apply, in light of the pre-litigation demand. However,
counsel did have full authority to settle the case, based upon the evaluation of Mr.
Weir’s liability claim and discovery conducted before the conference, as was
presented in Defendant’s ENE statement.

18 Docket No. 14 at 1-2.³ The Court fails to discern any connection between Plaintiff’s pre-litigation
19 demand and Ms. Stephenson’s contention that the ENE Order’s clear language regarding attendance
20 by an insurance representative does not apply. Nor does Ms. Stephenson’s contention that she had
21 “full authority” satisfy the ENE order.⁴ The ENE order plainly requires attendance by a
22 “representative of the insurance carrier with authority to settle this matter up to the full amount of
23 the claim.” Without any coherent justification—let alone the “substantial justification” required to
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25 ³ Ms. Stephenson clearly indicated that it is she, and not her client, to blame for failing to
26 comply with the Court’s order. *See* Docket No. 14 at 3.

27 ⁴ Although in no way dispositive, the Court notes that Ms. Stephenson’s contention in this
28 regard contradicts her statements during the ENE session at which she emphasized that she had only
“some” authority.

1 avoid sanctions—for the failure to comply with a clear Court Order, the Court finds that sanctions are
2 appropriate.

3 Courts have generally found an award of fees and costs appropriate in response to a party
4 disobeying attendance requirements of proper representatives at court-ordered settlement
5 conferences, *see, e.g., Official Airline Guides*, 6 F.3d at 1396, and the Court believes that is the
6 appropriate sanction here.⁵ Accordingly, Plaintiff shall submit a declaration of fees and costs in
7 preparing for and attending the ENE session within seven days hereof. At that time, the Court will
8 set reasonable fees and costs to be paid by Ms. Stephenson.

9 **IV. CONCLUSION**

10 For the reasons discussed above, the Court hereby **DISCHARGES** the order to show cause
11 as to Defendant and **SANCTIONS** Ms. Stephenson personally, pursuant to Fed. R. Civ. P. Rule
12 16(f), in the amount of Plaintiff's reasonable costs and attorney's fees incurred in preparing for and
13 attending the ENE session.

14 IT IS SO ORDERED.

15 DATED: February 26, 2013.

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18 NANCY J. KOPPE
19 United States Magistrate Judge
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27 ⁵ As the Court finds the payment of fees and costs sufficiently addresses all issues raised in the
28 order to show cause, it does not specifically address whether Defendant and its counsel appeared at the
ENE session in good faith (*i.e.*, the second issue raised in the order to show cause).